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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SOO LINE RAILROAD COMPANY,

Petitioner,

vs.

TOWN OF EAST TROY, a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

May federal grants now be used in conjunction with the collateral source rule to create fictitious tort damages and obtain windfall recoveries from third parties?

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SOO LINE RAILROAD COMPANY,

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vs.

TOWN OF EAST TROY, a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Soo Line Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding.

THE PARTIES

Petitioner is the Soo Line Railroad Company, a Minnesota corporation. Respondent is the Town of East Troy, Wisconsin, a municipal corporation.

OPINIONS BELOW

The opinions of the District Court (App. 19-24, 25-33) are not contained in any official reporter. The opinion of the Seventh Circuit Court of Appeals (App. 1-18) has not yet appeared in the federal reporter system.

JURISDICTION

(i) The judgment of the Seventh Circuit Court of Appeals was entered on October 8, 1980 (App. 35).

(ii) By a vote of 2-1, the original panel of the Court of Appeals (two circuit court judges and one district court judge)[1] denied rehearing on December 3, 1980 (App. 36). Petitioner's Suggestions For Rehearing In Banc was submitted to a vote among all active members of the Court of Appeals and was denied by a vote of 4-3 (one justice abstaining) (App. 37). On December 15, 1980, the Court of Appeals stayed the mandate until January 15, 1981, pending the filing of this Petition For Certiorari.

(iii) Jurisdiction to review the Court of Appeals judgment is conferred by 28 U.S.C. § 1254(1) and United States Supreme Court Rules 17(a) and 17(c).

---

[1] Honorable William G. East, Sr. United States District Judge for the District of Oregon, sitting by designation.

RELEVANT STATUTES

The federal statute relevant to this section is the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* (relevant sections are reproduced in Appendix hereto, App. 39-53).

STATEMENT OF THE CASE

Introduction And Summary

The derailment of a Soo Line Railroad train temporarily contaminated the privately-owned shallow wells of approximately 30 private citizens living in Lake Beulah, Wisconsin, a rural, unincorporated portion of the 36 square mile Town (township) of East Troy, Wisconsin. Each of these private individuals filed suit against the Railroad. These suits were subsequently settled by the Railroad for an amount in excess of $300,000.

After the accident, the Town, which was not supplying water to these individual plaintiffs or to any other resident of the Town and had no facilities to do so, used the occasion to apply to the United States Department of Housing and Urban Development (HUD) for a Community Development Grant to build a public water system. The Town's application was accepted and the Town received a $500,000 federal grant which it spent to study the water tables, form a sanitary district, buy land, and build a single public well system capable of serving the Lake Beulah area. The Town then offered

Lake Beulah residents the opportunity to use the public well in exchange for a tap-on fee and a monthly charge for any water used. Some residents elected to use the new public system and others did not.

The District Court, citing the "collateral source" rule, held that the Town could also collect an additional $500,000 from the Soo Line for the amount of the federal grant the Town obtained and spent to build the public well. The Court of Appeals affirmed! The facts in relevant detail are as follows:

Accident

On July 16, 1974, a Soo Line Railroad train derailed while traveling through an unincorporated area known as Lake Beulah in the Town (township) of East Troy, Walworth County, Wisconsin (Tr. 58, 62, 545). The derailment overturned a tank car containing an industrial chemical known as carbolic acid or phenol, and approximately 9,000 gallons of phenol spilled onto the ground adjacent to the railroad right of way (Def. Ex. 252, p. 1).

Private Property Damage

The area surrounding the accident site contained scattered homesites, a tavern and a small manufacturing plant (Def. Ex. 257A). The owners of each of these properties obtained water from shallow private wells that they individually owned and maintained (Tr. 90, 517). There was no County, Town or other public water supply system in the area (Tr. 90, 517). Shortly after the accident, it was discovered that some of the spilled phenol had permeated the ground and temporarily contaminated some of these shallow, privately-owned wells (Tr. 81, 526, 1065).

Suit Against The Soo Line

The private individuals whose property was affected by the phenol spill brought an action for damages against the Soo Line under the public nuisance statute of the State of Wisconsin entitling any person, county, city, village or town to maintain an action to recover damage for a public nuisance "from which injuries peculiar to the complainant are suffered". Wis. Stat. § 823.01.[2] (R. 3). Prior to trial, the phenol level in the private wells subsided through natural causes (Tr. 674, 705, 838), and each of the private plaintiffs settled his claim against the Railroad with a release of all claims being exchanged for substantial settlement payments from the Soo Line totalling in excess of $300,000 (R. 3).

Town's "Claim"

Despite the fact that the owners of all property affected by the accident settled their claims against the Railroad, the case proceeded to trial on the "claim" of the Town. The Town owned no wells, water or property affected by the accident; no individual plaintiff assigned any part of his claim to the Town; and the Town was not attempting to recover anything on behalf of any private individual. Rather, the Town sought to recover the amount of a federal grant which it applied for, obtained, and spent subsequent to the occurrence to build a public water system for the Lake Beulah area.

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[2] The Wisconsin Nuisance Statute provides:

§ 823.01 Jurisdiction over nuisances

"Any person, county, city, village or town may maintain an action to recover damages or to abate a public nuisance from which *injuries peculiar to the complainant are suffered*, so far as necessary to protect the complainant's rights and to obtain an injunction to prevent the same." (Emphasis added.)

In early 1975, the Town and its attorneys had prepared and submitted an application to the U.S. Department of Housing and Urban Development for a $500,000 Community Development Grant to build a centralized public water supply system to serve the Lake Beulah area (Offer of Proof, Def. Ex. 26). See 42 U.S.C. § 5301 *et seq.* On July 16, 1975, the Town's application was granted and a $500,000 letter of credit was issued by HUD against which the Town could write checks (Offer of Proof, Def. Ex. 267; Tr. 713-714). After it received this $500,000 grant, the Town formed a sanitary district, purchased land, and engaged various engineers and contractors to study, plan and build a public well and related facilities (Tr. 90) (Pl. Exs. 98, 99A, 99B).

No Town resident was obligated to use the Town's new system, nor was any resident entitled to do so free of charge (Tr. 700). Some residents chose to use the system while others elected not to use the public well (Tr. 700, 995). Those that did elect to use the Town's well had to pay the Town a tap-on fee as well as a monthly bill for all water used (Tr. 91, 682). As built, the Town's public system had the capacity of serving not only the existing Lake Beulah area residents, but also the Lake Beulah properties not yet developed or owner-occupied (Tr. 699).

The District Court Opinion

The United States District Court for the Eastern District of Wisconsin (Myron L. Gordon, Judge) denied the Soo Line's motion for summary judgment, ruling that the Town's obtaining and spending of a $500,000 federal grant to build its new public well that was not even in existence at the time of the occurrence constituted "an

injury peculiar to the Town" which the Town was entitled to recover from the Soo Line and that the "collateral source" rule prevented the federal grant from being introduced in evidence or offset against any judgment entered in favor of the Town (App. 23, 26). The case then proceeded to jury trial, and the jury, having no knowledge of the federal grant, returned a $500,000 verdict in the Town's favor (R. 129). The District entered judgment on the jury verdict (App. 34).

Court Of Appeals Opinion

The Court of Appeals in an opinion written by United States District Court Judge East affirmed the District Court, noting that the Town had "the power" to apply for a HUD grant and build a public water system for its residents (App. 5-6)—a proposition not disputed by the Railroad. Most shockingly, the Court concluded that requiring the Railroad to pay the Town for its new federally-funded public water system, that was neither damaged by the Railroad nor in existence at the time of the accident, was "the routine result of application of the collateral source rule" (App. 15).

REASONS FOR GRANTING THE WRIT

THE USE OF FEDERAL GRANTS TO GENERATE FICTITIOUS TORT DAMAGES AND OBTAIN WINDFALL RECOVERIES FROM THIRD PARTIES SHOULD BE STOPPED AT ONCE

We realize that this Court ordinarily will not review Court of Appeals decisions simply because they are "wrong". Nor would the fact that Petitioner has been required to pay $500,000 for non-existent "damage" that it did not cause, or the fact that the Court of Appeals totally ignored the "injury peculiar to complainant" requirement of the Wisconsin Nuisance Statute,[3] necessarily be sufficient reasons to merit this Court's attention. But the instant case is wrong, not only on its own merits, it is wrong as a precedent which, unless corrected by this Court, could result in a multiplicity of similar actions and attempts to use federal grants as a means of generating fictitious damage claims and windfall recoveries by public bodies. Such a result is totally inconsistent with the public purpose of all federal grants and is unsupported by any rule of law including the "collateral source" rule.

Collateral Source Rule Inapplicable

The collateral source rule holds that where a tortfeasor *has caused actual damage or loss*, subsequent reimbursement from a third party source (e.g., insurer, retirement

[3] Although this Court has found a similar requirement under the common law, *Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91 (1838) (city of Georgetown could not maintain public nuisance action for blockage of Potomac River since it owned no property affected by the nuisance and thus suffered no "special injury".

fund, etc.) will not permit the tortfeasor to avoid liability for the damage he has caused. For a general discussion of the rule as applied throughout the United States, see Maxwell, *The Collateral Source Rule In The American Law of Damages*, 46 Minn. L. Rev. 669 (1962); *Unreason and the Law of Damages: The Collateral Source Rule*, 77 Harv. L. Rev. 741 (1964). This Court recognized the rule in *Eichel v. New York Central R.R.*, 275 U.S. 253 (1963).

Under any view, the Court of Appeals' decision turns the rule inside out and makes it a vehicle by which otherwise non-existent "damages" can be created long after an accident has occurred. "Collateral source" might be applicable if the Railroad caused damage to an existing public improvement and HUD funds were used for the repair. But the instant accident caused no damage to the Town for which federal reimbursement was sought. Here no public improvement was even in existence, much less damaged by the Railroad. Nevertheless, the Court of Appeals holds that the Town's expenditure of the subsequently obtained federal grant constitutes "damages" against which the grant cannot be offset!

The error in the Court of Appeals' holding is aptly illustrated by the Sixth Circuit Court of Appeals' opinion in *Roundhouse v. Owens-Illinois, Inc.*, 604 F.2d 990 (6th Cir. 1979), the only other case to consider the "collateral source" rule in conjunction with a federal grant. In *Roundhouse*, defendants sold plaintiffs more than $250,000 worth of diseased fish. Plaintiffs had to destroy the fish. Subsequently, plaintiffs received $51,000 in federal funds "as partial compensation for the destruction of their fish" (604 F.2d at 994). The Court of Appeals for the Sixth Circuit held that this was a proper case for application of the collateral source rule and that the federal funds would not be offset against

the damages actually caused by defendant's conduct since "a wrongdoer cannot benefit from payments *to the victim* by a third party" (604 F.2d at 995) (emphasis added).

The rationale of *Roundhouse* and all other collateral source rule cases is that a wrongdoer who causes injury or damage should not benefit because an uninvolved third party subsequently reimburses the "victim" for all or part of the *actual damage caused by defendant's conduct.* But the Soo Line did not cause any damage to the Town for which third party reimbursement was obtained. The only parties who suffered actual loss or damage in this case were the individual property owners, each of whom was indemnified by the Railroad's settlement payment. The Town was not a "victim" of a tort, but an opportunist who attempted to use the collateral source rule and a federal grant obtained under the Community Development Act to place it in a far better position than it was in prior to the accident so that:

1) The Town now owns a new permanent public water system that it did not have prior to the accident and that was never damaged by the Soo Line.

2) The Town's system, including all legal work and engineering studies in connection therewith, has been fully paid for by the $500,000 federal grant.

3) The Town receives an extra $500,000 windfall from the Soo Line.

This result, while sure to enrich the Town's coffers for years to come, is a total misuse of the federal grant system and has no basis in any legal theory. This Court has recently restated the principle that compensatory damages are limited to actual "monetary loss". *Norfolk & Western R. Co. v. Leipelt,* 444 U.S. 490, 494 (1979).

We ask this Court to apply the same principle in the instant case and, either by full review or summary reversal, to correct this manifestly dangerous precedent.

CONCLUSION

For the reasons stated herein, Petitioner Soo Line Railroad Company respectfully requests that its Petition For Certiorari to the Seventh Circuit Court of Appeals be granted.

In the alternative and at the very least, we ask the Court in the exercise of its supervisory power[4] to reverse the Court of Appeals' 4-3 decision denying Petitioner's Suggestions For Rehearing In Banc and to order that a rehearing in banc be granted to consider the issues raised herein.

Respectfully submitted,

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[4] See *United States ex rel. Robinson v. Johnson*, 316 U.S. (1942); *Civil Aeronautics Board v. American Air Transport, Inc.*, 344 U.S. 4, 5 (1952); *Western Pacific Railroad Case*, 345 U.S. 247, 260 n. 20 (1953).

APPENDIX

10/8/80 Opinion Of The Seventh Circuit Court Of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 79-2120

TOWN OF EAST TROY, a municipal corporation,

Plaintiff-Appellee,

v.

SOO LINE RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 75-C-122—**Myron L. Gordon**, *Judge.*

ARGUED APRIL 30, 1980—DECIDED OCTOBER 8, 1980

Before CUMMINGS and BAUER, *Circuit Judges,* and EAST,* *District Judge.*

EAST, *District Judge.* The Soo Line Railroad Company (Soo Line) appeals the judgment of the District Court entered on June 14, 1979 pursuant to a jury verdict of $500,000 in favor of the Town of East Troy, Walworth County, Wisconsin (the Town). The verdict was based on the Town's costs to remedy a ground water pollution problem caused by Soo Line's negligence.

We note jurisdiction under 28 U.S.C. § 1291 and affirm.

---

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

BACKGROUND

On July 16, 1974 at about 3:15 P.M., a tank car and 18 other cars being transported by Soo Line through an unincorporated area known as Lake Beulah or Beulah Station within the limits of the Town derailed. The tank car, carrying 20,000 gallons of phenol, or carbolic acid, ruptured and spilled approximately half its contents onto the ground. The phenol, manufactured by the Georgia-Pacific Corporation (Georgia-Pacific) was en route from Georgia-Pacific's plant in Louisiana to Borden Chemical Ltd. in British Columbia. The parties' stipulation of facts presented to the jury described phenol:

> "Phenol is a by-product of quemene which is derived from benzene which in turn comes from oil. It is a colorless to light pink crystalline material which melts at 106° Fahrenheit. The Interstate Commerce Commission lists phenol as a Class B Poison. It is widely used in commerce and industry in the manufacture of hospital disinfectants and other drugs and pharmaceuticals. It is also used in the manufacture of certain glues and resins and in some plastics."

The Lake Beulah area contains scattered homesites, a tavern, and a small manufacturing plant. At the time of the spill, there was no public water supply system. Residents relied on shallow private wells for domestic water use. Despite clean-up efforts, including the removal by Soo Line at the advice of the State Department of Natural Resources of over one million pounds of contaminated dirt, residents of the area complained of a bad taste and unusual smell in their water and experienced headaches, nausea, mouth sores, diarrhea, and dark urine. A toxicologist with the Environmental Protection Agency advised that no individual should be exposed for more than five days to concentrations greater than .001 milligrams of phenol per liter of water. A number of wells close to the spill site had phenol concentrations in excess of this standard. The distance the phenol spread and the extent of future hazards are disputed.

The Town is a rural area of 36 square miles and has approximately 3,000 residents. At the time of the accident,

there was no Town Sanitary District and no centralized water supply for any part of the Town. The only properties owned by the Town in 1974 were the Town Hall and some lake landings and roads, none of which were damaged by the spill.

In early 1975, the Town retained private engineering firms to study the feasibility of constructing a public water supply system to serve Lake Beulah. The Town then formed a Sanitary District, purchased land, and engaged various engineers and contractors to build a centralized deep well public water system. The Town well was drilled to a deep aquifer separated by an impermeable layer of shale from the contaminated aquifer from which the individual property owners obtained their water. Those residents who elected to use the Town's system paid a tap-on fee and a monthly bill for water used. The system has the capacity for serving all lots in the Lake Beulah area.

The cost of constructing the well and the related mains, pumps, and pump house was $125,000. The Town paid for the well and for the services of its engineers, planners, excavators, chemists, attorneys, geologists, plumbers, hydrogeologists, etc. with a $500,000 Community Development Grant from the U. S. Department of Housing and Urban Development (HUD).

PROCEEDINGS IN THE DISTRICT COURT

The Town, together with the individuals who claimed damage from the spill, filed suit against Soo Line and Georgia-Pacific on February 24, 1975. All individual plaintiffs settled, and the claim against Georgia-Pacific was dismissed. The case proceeded to trial as a public nuisance action in which the Town sought to recover $543,000 for its expenses incurred as a result of the spill. Soo Line's motion for summary judgment on the ground that Wisconsin law does not permit the Town to maintain such an action or to obtain such a windfall recovery was denied, and Soo Line was precluded from introducing any evidence of the HUD grant at trial. In a special verdict, the jury found Soo Line guilty of negligently creating a public nuisance and awarded the Town $500,000. The jury rejected the claim that Soo Line was guilty of wilful and

wanton conduct. Soo Line's post-trial motions for judgment notwithstanding the verdict, for an alteration in the judgment, and for a new trial were denied. This appeal followed.

ISSUES ON APPEAL

1. Was the Town's public nuisance action barred by the "injury peculiar to the complainant" requirement of § 823.01 of the Wisconsin Nuisance Statute?

2. Did the Town's receipt of the HUD grant prevent recovery of damages against Soo Line?

3. Did various errors in jury instructions and evidentiary rulings entitle Soo Line to a new trial?

DISCUSSION

Issue 1: Town's Standing to Bring Public Nuisance Action.

This case was tried on a public nuisance theory under the Wisconsin Nuisance Statute. Wis. Stats. § 823.01 reads as follows:

> "823.01 Jurisdiction Over Nuisances
>
> "Any person, county, city, village or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, so far as necessary to protect the complainant's rights and to obtain an injunction to prevent the same."

Thus, in order to recover its damages, the Town had to show that it suffered injuries peculiar to itself.

Soo Line does not appeal the finding that the phenol spill created a public nuisance. It contends, however, that the Town can claim damages only if land it owned was injured by the spill or if some Town function was impaired. It relies on cases decided under predecessor statutes to § 823.01. *See Algoma v. Peterson,* 233 Wis. 82, 288 N.W. 809 (1939); *Juneau v. Badger Cooperative Oil Co.,* 227 Wis. 620, 279 N.W. 666 (1938); *City of Madison v. Wisowaty,* 211 Wis. 23, 247 N.W. 527 (1933); *City of Milwaukee v. Milwaukee and Beloit Railroad Co.,* 7 Wis. 76 (1858). Soo Line con-

tends that the statute does not permit recovery for expenses incurred by the Town in its "voluntary" efforts to alleviate the public nuisance. *See Carey v. Brooks,* 1 Hill 365 (S.C. 1833). Soo Line argues that only the individual property owners had the right to bring actions under the nuisance statute.

The District Court agreed with Soo Line's statement of the question but arrived at a different answer in denying Soo Line's motion for summary judgment:

> "Since the sole relief sought by the town is damages, the question is whether the town alleges any injuries peculiar to itself. In my judgment, the town has done so. The expenses incurred by the town in assisting the residents affected by the phenol spill are an injury peculiar to the town; none of the other plaintiffs or town residents may properly claim those items of injury as their own.
>
> "In addition, the water system which the town constructed is the result of an injury peculiar to the town, to the extent such system was necessary to overcome the damage caused by the phenol spill."

There is no question that the Town has the power to expend money for the public health and welfare. Wis. Stats. § 60.18 (Supp. 1979-80) states:

> "The qualified electors of each town shall have power at any annual town meeting by vote:
>
> • • •
>
> "(12) . . . To direct, by resolution, the town board to exercise all powers relating to villages and conferred on village boards by ch. 61, except such power, the exercise of which would conflict with the statutes relating to towns and town boards. Any such resolution heretofore adopted pursuant to existing law or hereafter adopted pursuant to this law shall remain in force until rescinded."

The Town passed such a resolution on April 14, 1973 and has never rescinded it. Wis. Stats. § 60.29(13) vests the Town board with authority "[t]o exercise powers relating to villages and conferred on village boards when lawfully

authorized so to do by resolution of the town meeting adopted pursuant to subsection (12) of section 60.18."

Section 61.34 enumerates powers of a village board which the Town became authorized to exercise upon passage of its resolution. Section 61.34(1) provides:

> "61.34 Powers of village board
>
> "(1) General grant. Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable water, and the public service, *and shall have power to act* for the government and good order of the village, for its commercial benefit and *for the health, safety, welfare and convenience of the public,* and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language." (Emphasis supplied).

Thus, by adopting its resolution, the Town electors authorized their board to act "for the health, safety, welfare and convenience of the public." The District Court based its decision on the Town's power under §§ 60.18(12) and 61.34(1) to protect its residents' health, safety, and welfare.

Although Soo Line does not dispute the Town board's authority to act, it claims that the board's gratuitous expenditures cannot bootstrap it into the position of an injured party. The Town argues, however, that it was obligated to exercise its full power to protect the health of its residents.

When questioned about this obligation at oral argument, counsel for the Town referred the Court to the petition process in Chapter 60 of Wisconsin Statutes. Counsel stated that this was the method used to create the sanitary district here. Sections 60.301-60.303 do empower the Town board to establish a sanitary district when specified petition and hearing requirements are met; and § 60.306(2) (Supp. 1979-80) provides that the sanitary

district commission "*shall* project, plan, construct and maintain a system or systems of waterworks . . . necessary for the promotion of the public health, comfort, convenience or public welfare of such district . . . ." (Emphasis supplied). Although we have no reason to doubt that the petition procedures specified were properly complied with, the record before this Court is silent.[1] We assume that the Town made no record of its compliance with the petition process for creation of a sanitary district because it relied in the District Court on its authority under its §60.18(12) resolution to exercise the powers of a village board, rather than on its § 60.301 authority.

We realize that the Town, as appellee, may urge this Court to affirm on grounds it did not press before the District Court. An appellee may

> "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924). *Accord, LeTulle v. Scofield*, 308 U.S. 415, 421 (1940); *Morley Const. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937); *Drinan v. A. J. Lindemann & Hoverson Co.*, 238 F.2d 72, 74 (7th Cir. 1956).

In this case, however, the record evidence simply does not establish that the Town was forced by petition of the requisite percentage of landowners to create the sanitary district. Nonetheless, this gap in the record does not restrain us from concluding that the Town was, indeed, obligated to act as it did. Even in the unlikely event that counsel's statement that the Town was compelled to act is ungrounded, it is clear that the Town could have been compelled to act by 51% of the landowners or by the owners of 51% of the land in the proposed district. Section 60.302(1). The record does indicate substantial public pressure on the Town to eliminate the pollution problem caused by the phenol spill.

---

[1] The evidentiary record is replete, however, with public protests and demands for useable domestic water.

We do not find it necessary to rely on §§ 60.301-60.306, however, because we believe the authority relied on by the District Court is sufficient in the circumstances presented here to invoke an obligation on the part of the Town board to alleviate a threat to the public health.

This being a diversity case, we follow the rule of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), and apply the substantive law of Wisconsin. As this Court stated in *Warner v. Gregory,* 415 F.2d 1345, 1346 (7th Cir. 1969), however:

> "*Erie* and its progeny do not require an automatic application of the last highest state court determination. Professor Corbin in describing the task of the federal court in applying state law said:
>
> > " 'When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. It must use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination —statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic, both inductive and deductive.' Corbin, The Laws of Several States, 50 Yale L.J. 762, 775 (1941).
>
> "Justice Frankfurter struck the same chords in his concurring opinion in *Bernhardt v. Polygraphic Company of America, Inc.,* 350 U.S. 198, 205-212, 76 S.Ct. 273, 100 L.Ed. 199 (1956), where he looked behind the Vermont Supreme Court's decisions to determine the present status of Vermont law."

And, of course, we need apply judicial precedents only "to cases which factually require the same legal conclusion, but not to cases involving significantly different facts." *Ohio Casualty Insurance Co. v. Smith,* 297 F.2d 265, 267 (7th Cir. 1962).

In the recent case of *McKenna v. Ortho Pharmaceutical Corp.,* No. 78-2567 (3d Cir. March 18, 1980), the Court was faced with a nine-year old Ohio Supreme Court case,

which had never been expressly overruled, holding, for statute of limitations purposes, that a cause of action for medical malpractice arises at the latest when the physician-patient relationship terminates. The Court had considered and rejected the rule recognizing the date when the plaintiff discovers the alleged negligence, stating that adoption of the discovery rule was for the legislature. Nevertheless, the *McKenna* Court, in fulfilling its task of deciding how the Ohio Supreme Court would rule, concluded that the Ohio Court would hold that the applicable statutes of limitations were tolled until the plaintiff discovered the cause of her injuries. The Court stated:

> "In the absence of authority directly on point, decisions by [the Ohio Supreme Court] in analogous cases provide useful indications of the court's probable disposition of a particular question of law. It is important to note, however, that our prediction 'cannot be the product of a mere recitation of previously decided cases.' In determining state law, a federal tribunal should be careful to avoid the 'danger' of giving 'a state court decision a more binding effect than would a court of that state under similar circumstances.' Rather, relevant state precedents must be scrutinized with an eye toward the broad policies that informed those adjudications, and to the doctrinal trends which they evince." Slip Opinion at 9-10. (Footnotes omitted).

In addition, the Court quoted *Becker v. Interstate Properties,* 569 F.2d 1203, 1206 (3d Cir. 1977):

> "A diversity litigant should not be drawn to the federal forum by the prospect of a more favorable outcome than he could expect in the state courts. But neither should he be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show." *Id.* at 11-12.

Fortified with these teachings, we examine the law of Wisconsin relevant to the issues here, beginning with the decisions of the Wisconsin Supreme Court, "the best authority on its own law." *Commissioner v. Estate of Bosch,* 387 U.S. 456, 465 (1967).

In *City of Juneau v. Badger Cooperative Oil Co.*, 227 Wis. 620, 279 N.W. 666 (1938), the Wisconsin Supreme Court considered an action to enjoin construction of a bulk oil storage plant and filling station. The opinion largely concerned itself with invalidating the city's ordinances which were designed to keep such facilities outside the city limits. In one paragraph, however, the Court considered common law nuisance and the standing of the city under Wis. Stats. § 280.02, the predecessor to § 823.02, which provided in pertinent part that an action to abate a public nuisance must be "prosecuted . . . by the attorney-general upon his own information, or upon the relation of a private individual having first obtained leave therefor from the court." The Supreme Court in *City of Juneau* held: "As leave of the court was not obtained and as the city is not 'a private individual' anyhow, and no special injury to the city was proved, no case in favor of the city was established, and the complaint must be dismissed." 279 N.W. at 673.

The Court's statement that the city suffered no special injury was gratuitous dictum not necessary to the result; the city clearly could not bring an action under § 280.02 as it was not "a private individual" and it had not obtained leave from the Court. *State v. La Crosse Theaters Co.*, 232 Wis. 153, 286 N.W. 707, 709 (1939), makes it clear that special injury is not a requirement under § 280.02. The *Juneau* Court may have been implying by its "special injury" language that the city would also lack standing under § 280.01, the predecessor to the statute involved in the present case. Section 280.01 read: "Any person may maintain an action to recover damages for and to abate a private nuisance or a public nuisance from which he suffers injury peculiar to himself, so far as necessary to protect his rights and to obtain an injunction to prevent the same." Had the Court expressly considered § 280.01 and had it concluded that the city was a "person," then its statement that "[i]t is not shown that the city has any property affected by the defendant's tanks and no other special injury or interest of the city is shown," 279 N.W. at 673, would carry more precedential weight. In any event, the Court implied that not only a property interest, but any "other special injury or interest" was sufficient to

maintain a nuisance action. The Court, of course, gave no indication whether expenditure of funds to clean up a spill or to put out a fire caused by negligence at defendant's plant would constitute a special injury to the city.

City of Algoma v. Peterson, 233 Wis. 82, 288 N.W. 809 (1939), was an action to enjoin construction of a gasoline service station. The City of Algoma's ordinance, which was similar to Juneau's, was likewise struck down; and its § 280.02 claim was rejected as follows: "The city is not a private individual, nor did it bring the action in the name of the state,[2] nor did it first procure leave of the court to bring the action. This requires dismissal of the action." 288 N.W. at 810. The Court then went on to state:

> "The plaintiff has no property that can be affected by the erection of the gasoline station, and without that it can not bring an action to restrain either a private or public nuisance under Sec. 280.01, Stats. *See La Crosse Theatres Co.* case, *supra.*" At 810.

La Crosse Theaters, however, does not hold that a § 280.01 plaintiff must have property affected by the alleged nuisance. *La Crosse Theaters* was a § 280.02 case, and its only comment on the requirements under § 280.01 was to restate the statute's own broad requirement that the plaintiff suffer some "injury peculiar to himself." 286 N.W. at 709.

The *Algoma* Court then considered the statute relied on by the trial court in allowing the city to proceed. It was a broad statute, similar to § 61.34 relied on by the Town, which granted power to act "for the health, safety, and welfare of the public." The Court assumed that this statute would authorize maintenance of the action but for § 280.02 which precluded it, citing *Madison v. Wisowaty*, 211 Wis. 23, 247 N.W. 527.

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[2] The Wisconsin Supreme Court, in *La Crosse Theaters*, 286 N.W. at 709, explained who the named plaintiff must be in § 280.01 and § 280.02 suits: "The former section applies to actions brought by a private person in his own name and right. The latter applies to actions by the state brought on relation of a private person."

In *Madison*, the defendant had erected structures on the bed of Lake Monona, which is owned by the state but situated within the City of Madison. The Wisconsin Supreme Court held that the city's action to abate the nuisance was demurrable for failure to state a cause of action:

> "[T]here is no allegation in the complaint that the city has suffered any private or special injury peculiar to itself, or that defendants' structures encroach upon or interfere with any property owned by the city or the exercise of any right vested in it." 247 N.W. at 529.

Since the city had failed to allege any injury to itself or any interest in the lake bed, it was not the real party in interest; the state was. Had the city sued in the state's name rather than its own under § 280.02, there would have been no problem. The Court even noted a statute giving the city jurisdiction to bring the action that it believed satisfied the leave of the court requirement. The *Madison* case is largely an instruction on proper pleading; its holding need not detain us in reaching our result. The broad language regarding the type of interest or injury necessary to give the city standing implies that an ownership interest is not necessarily required.

None of the above cases cited by Soo Line are so close factually to this case as to require the same legal conclusion that the Town may not maintain its nuisance action. *See Ohio Casualty.* Nor do we feel constrained by the supreme court's brief comments in *City of Milwaukee v. Milwaukee & Beloit Railroad Co.*, 7 Wis. 76, 89-90. These early cases primarily relied on provisions of § 280.02 which barred the actions; those provisions are simply not involved here. We do not quarrel with the obvious requirement of § 823.01 that the Town show some interest on its part or some injury peculiar to itself, but we are not convinced that Wisconsin law requires the Town to establish a property interest interfered with by the public nuisance.

Significantly, none of the cited cases involved an actual present danger to the public health and welfare. The Town was not a distinterested party contemplating some future potentially harmful occurrence. We do not believe that the Wisconsin Supreme Court would have the Town board sit

idly by and wait for the state to take action to abate a serious threat to the public health when the Town had the undisputed power to correct the situation and when the people of the Town were severely inconvenienced, ill, and clamoring for action. Indeed, the Court has acknowledged the grave problem of water pollution and the power of a Town board to control it. *Town of Norway v. State Board of Health*, 32 Wis.2d 362, 145 N.W.2d 790 (1966), involved the town of Norway's standing in judicial review of the State Board of Health's decision to approve a sewage treatment facility. The supreme court stated at 145 N.W.2d at 794:

> "It is conceeded [*sic*] Norway has no riparian interest in Wind Lake but by authority of Sec. 60.18(12), Stats., it passed a resolution in 1962 authorizing the town board of Norway to exercise the powers of a village board. These powers include the right to manage and control navigable water and to act for the health, safety, welfare and convenience of the public. Sec. 61.34(1), Stats. The pollution of public waters is a matter of great public concern and inimical to public health. *State ex rel. Martin v. City of Juneau* (1941), 238 Wis. 564, 572, 300 N.W. 187. This concern is not exclusively that of the Board and the Committee. We think this governmental right in the town board of Norway to prevent and control the pollution of waters is sufficient legal interest to constitute Norway an aggrieved person."

Although the circumstances giving rise to *Town of Norway* are certainly different from the circumstances here, the language of that decision evinces deference to and encouragement of attempts by towns to exercise their governmental powers to control water pollution—even absent any proprietary interest.

Moreover, the Wisconsin legislature has expressed its desire for municipalities to exercise broad powers on behalf of the public welfare, and particularly in the area of water pollution. In 1939, the nuisance statutes were amended to authorize cities, villages, and towns to bring nuisance actions. In 1943, they were authorized to bring suit under § 280.02, now § 823.02, in their own names

without obtaining leave from the court. In addition to these and to the statutes cited above regarding establishment of sanitary districts and exercising village board powers, numerous provisions of Wisconsin statutes, not directly applicable here, indicate that wide latitude is given to towns in protecting the waters of the state. *E.g.*, § 66.33 (towns authorized to accept federal grants for water pollution prevention or abatement); § 144.025(1) ("It is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local" to protect waters of the state, "ground and surface, public and private"); § 146.14 (local health officials may abate nuisances caused by improper sewerage disposal).

We conclude from our analysis of the foregoing that were the Wisconsin Supreme Court to rule on this case, it would find a compelling governmental interest and duty on the part of the Town to do whatever was reasonable at the time to ameliorate the hazardous situation as quickly as possible and to protect the health of the people.[3] All necessary and reasonable expenses that were incurred in the exercise of the Town's lawfully delegated powers are recoverable under § 823.01.[4]

Issue 2: HUD Grant.

Soo Line claims that the Town has not suffered any injury and, therefore, cannot recover damages. We have rejected, however, its view that recovery under § 823.01 requires injury to the Town's own property. The jury found that Soo Line's negligence was the proximate cause of the Town's loss. The District Court held, and we agree, that this loss is actionable under § 823.01. If the Town has

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[3] Because of our conclusions regarding this issue, we reject Soo Line's challenges to the District Court's jury instructions on nuisance.

[4] Soo Line is mistaken, however, in its belief that the necessity of specific expenses is to be judged with the benefit of hindsight. The Town cannot be expected, during a public health disaster and with discrepant professional opinions, to foresee precisely which actions will be successful and which will be cumulative or superfluous.

obtained a windfall, such is the routine result of application of the collateral source rule.

In *Rixmann v. Somerset Public Schools,* 83 Wis.2d 571, 266 N.W.2d 326 (1978), reimbursement of medical expenses by plaintiff's insurer did not prevent plaintiff's full recovery from defendant. *See also Thoreson v. Milwaukee and Suburban Transport Co.,* 56 Wis.2d 231, 201 N.W.2d 745 (1972); *Merz v. Old Republic Insurance Co.,* 53 Wis.2d 47, 191 N.W.2d 876 (1971); and *McLaughlin v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.,* 31 Wis.2d 378, 143 N.W.2d 32 (1966), for the proposition that plaintiff's recovery will not be reduced because of reimbursement by an independent source for damages caused by defendant. There is no question that Wisconsin law prefers double recovery for a plaintiff to allowing a defendant to avoid paying for the consequences of his or her wrongful acts. Similarly, in *Roundhouse v. Owens-Illinois, Inc.,* 604 F.2d 990 (6th Cir. 1979), the Sixth Circuit ruled that receipt of federal funds in partial reimbursement of plaintiff's loss did not bar recovery of the full amount of damages caused by defendant's conduct.

It is not our task to analyze the wisdom of the collateral source rule. Having determined that the rule is the law of the state, it is eminently clear that the Town was entitled to recover its full damages and that Soo Line was properly prevented from possibly creating jury bias in its favor by mentioning or producing evidence of the HUD grant to the Town.

Issue 3: New Trial.

Soo Line cites several actions by the District Court which it claims entitle it to a new trial if this Court rules against it on Issues 1 and 2. We have already disposed of its allegations that the nuisance instructions were improper and that evidence of the HUD grant should have been admitted. We now conclude that the remainder of Soo Line's allegations of error are likewise without merit.

Soo Line's witness Bertel E. Pearson was prohibited from giving opinion testimony because he had not been disclosed as an expert witness in response to the Town's

interrogatories until after the Court-imposed discovery deadline had passed, thus depriving the Town of the opportunity to depose Pearson.[5] The Court's deadline was reasonable and was applied to both parties. The exclusion of Pearson's expert testimony was a proper exercise of the Court's discretion.

Soo Line alleges that the District Court erred in giving a res ipsa loquitur instruction since the Town had presented evidence of specific negligence. Although Soo Line acknowledges that Wisconsin law does not preclude the res ipsa loquitur instruction in all cases involving specific negligence, it believes this case is sufficiently similar to *Utica Mutual Insurance Co. v. Ripon Cooperative,* 50 Wis. 2d 431, 184 N.W.2d 65 (1971), in which giving the res ipsa loquitur instruction was held to be reversible error, to require the same result here. We disagree. In that case, the Court rejected the use of the res ipsa loquitur instruction because the plaintiff had offered expert testimony as to "exactly where, how and why" the accident occurred. 184 N.W.2d at 69. However, the Court generalized that between the poles of pure conjecture and such substantial evidence as to constitute a complete explanation was a middle ground where the giving of the instruction would be proper. *Id.* We agree with the District Court that this case falls squarely in that middle ground. The giving of the instruction here was correct.

Soo Line charges further that portions of the deposition of Harry A. Lloyd read at trial constituted inadmissible hearsay. Specifically, Lloyd testified that he overheard a discussion among several railroad employees in which comments were made concerning an excess number of derailments in the area and the improper placement of the empty cars on the train. The statements were admissions by a party opponent under Rule 801 of the Federal Rules of Evidence and were, therefore, not hearsay. The fact that Soo Line then read portions of Lloyd's cross-examination

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[5] We discount Pearson's deposition of December 1, 1975. Soo Line even conceded that, though it knew the identity of its experts shortly prior to the discovery deadline of December 15, 1978, depositions would not have been meaningful at that time because its experts had not yet completed their work.

in which Lloyd expressed some doubts as to whether the declarant was definitely a railroad employee does not render the initial statements inadmissible.

Exclusion of the Southeast Wisconsin Regional Planning Report indicating that the Town probably would have to install a public well at some time in the future was proper because the report was totally irrelevant to the issue of whether the Town's installation of a water distribution system at this time was the result of defendant's negligence in causing the pollution of the private wells.

Soo Line asserts that the Town did not prove the reasonableness of its expenses. It is true that the Town did not produce expert testimony as to the reasonableness of every itemized expense. Nevertheless, it did present, in addition to bills and cancelled checks, sufficient evidence of the nature of the work done by the various professionals, the time involved, and the rate of compensation, thereby enabling the jury to determine the reasonableness of the expenses. The engineer with the highest fees did testify as to the reasonableness of his fees. Soo Line did not challenge the Town's expenses as being unreasonable. Although the expenses clearly must be reasonable, Soo Line has cited no case supporting its view that the plaintiff must present expert testimony on reasonableness of fees even if the record contains substantial evidence on which the jury could determine reasonableness. On the contrary, in the cases relied on by Soo Line, the supreme court actually found there was no evidence in the record from which the fact-finder could determine if the claimed expenses were reasonable. *Nimlos v. Bakke,* 223 Wis. 473, 271 N.W. 33, 34 (1937); *Tullgren v. Karger,* 173 Wis. 288, 181 N.W. 232, 234 (1921). Furthermore, in *Gerbing v. McDonald,* 201 Wis. 214, 218-19 (1930), in which the Court allowed recovery of relatively small medical bills without proof of reasonableness, the Court said:

> "The weight of authority seems to be that where the character of the injury and of the treatment and the services of the physician and the amount paid for the service are fully proved, this constitutes evidence from which the jury may allow damages although there is no proof of either necessity or the reasonable value of the services."

As the supreme court said in *Reinke v. Woltjen*, 32 Wis. 2d 653, 146 N.W.2d 493, 494 (1966), quoting *Mack Trucks, Inc. v. Sunde*, 19 Wis.2d 129, 135-36, 119 N.W.2d 321, 324 (1963):

> "A verdict approved by a trial court must be sustained if there is credible evidence which under any reasonable view admits of an inference that supports the jury's findings."

Finally, we reject Soo Line's claim that the District Court erroneously admitted evidence concerning the dangers of phenol in its undiluted form and in combination with chlorinated water. This testimony was relevant to the existence and extent of the public health hazard to which the Town was responding.

Soo Line's arguments for a new trial leave us unconvinced. Having failed to agree with any of Soo Line's allegations of error, we affirm the judgment of the District Court.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

District Court's 4/5/79 Order Denying Soo Line's Motion For Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TOWN OF EAST TROY, et al.,

Plaintiffs,

No. 75-C-122 v.

SOO LINE RAILROAD COMPANY, et al.,

Defendants.

DECISION and ORDER

This action is before me on the motion of the defendant Soo Line Railroad, joined by the defendant Georgia Pacific Corporation, for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, dismissing the claim of the plaintiff Town of East Troy.

The action arises out of the derailment of one of the railroad's trains in the Town of East Troy in July, 1974. It is alleged that the derailment caused carbolic acid manufactured by and transported for Georgia Pacific to leak from a railway tanker car, resulting in the contamination of the water wells and septic systems of many individuals residing in the Lake Beulah area of the town. Many of these individuals have joined as plaintiffs in this action and seek damages for injuries of various kinds as a result of the allegedly wrongful conduct of the defendants.

The instant motion involves the claims of the plaintiff Town of East Troy. The town's claims, as narrowed by the court's decision on a prior motion to dismiss reported at 409 F. Supp. 326 (1976), include a claim that the railroad was negligent in several respects and that its negligence produced a public nuisance in the form of

water pollution and septic system contamination to the prejudice of the "health, comfort, safety and property of certain of the residents, school children, property owners, taxpayers, tourists and guests of the plaintiff town. . . ." The town seeks in excess of 1 million dollars in damages for the cost of a new water system in the affected area and for other miscellaneous expenses it incurred as a result of the acid spill. The town also seeks the same damages from Georgia Pacific, which allegedly failed to investigate and take corrective measures after the acid spill occurred.

FACTS

For purposes of the instant motion, the following pertinent facts are undisputed. A Soo Line train suffered a derailment on July 16, 1974; a railway tanker car containing carbolic acid (phenol) was damaged in the derailment, and portions of its contents leaked onto the ground. The derailment occurred in the Town of East Troy adjacent to an unincorporated rural residential area known locally as "Lake Beulah."

As a result of the derailment, several privately-owned shallow wells in the Lake Beulah area were contaminated. There was no municipal water distribution system in the Lake Beulah area at the time of the derailment. Privately owned shallow wells were used by the residents for drinking water and all other purposes. Approximately 60 private wells are alleged to have been affected.

There is no claim that any property owned by the town was affected or threatened by the phenol contamination, although the town does allege injury to the "health, comfort, safety and property" of residents and other members of the public as recited above.

Subsequent to the derailment and consequent contamination, the town determined that it would undertake the function of furnishing water to residents of the Lake Beulah area. The town secured a granted of $500,000 from the United States Department of Housing and

Urban Development (HUD) to finance the construction and development of its municipal water system to serve the residents of the area. The grant was applied for and approved under the Housing and Community Development Act of 1974 (Public Law 93-383, 88 Stat. 638).

Upon approval of such grant, HUD issued a letter of credit to the town and bills were paid by the town in connection with the municipal water system by making draws against the letter of credit to cover invoices as they were received. The town charges users for supplying water by means of its new municipal water system.

In addition to the cost of the new water system, the town seeks to recover damages for expenses it incurred for various services it performed and for employees it hired for the purpose of aiding persons affected by the phenol spill.

DISCUSSION

The defendants urge that they are entitled to summary judgment dismissing the town's claim for damages allegedly caused by a public nuisance created by the defendants' wrongful conduct. This argument rests upon section 280.01, Wis. Stats. (1973), now renumbered as section 823.01, Wis. Stats., which provides:

> "Any person, county, city, village or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, so far as necessary to protect the complainant's rights and to obtain an injunction to prevent the same."

The defendants' primary contention is that the town is not authorized to maintain a damage suit for a public nuisance in the absence of proof of "injuries peculiar to" itself "so far as necessary to protect" its rights, within the meaning of section 823.01. In addition to the unambiguous terms of the statute, Wisconsin cases support the premise that municipalities which do not suffer injuries peculiar to themselves may not commence

actions for relief due to a public nuisance. Madison v. Wisowaty, 211 Wis. 23, 247 N.W. 572 (1933); see also Juneau v. Badger Cooperative Oil Company, 227 Wis. 620, 279 N.W. 666 (1938), and City of Algoma v. Peterson, 233 Wis. 82, 288 N.W. 809 (1939). A town is authorized to prosecute an action to enjoin a public nuisance in its own name, without alleging any injury peculiar to itself, pursuant to section 823.02, Wis. Stats., but it is clear that the same is not the case in an action for damages or for abatement of the nuisance.

Since the sole relief sought by the town is damages, the question is whether the town alleges any injuries peculiar to itself. In my judgment, the town has done so. The expenses incurred by the town in assisting the residents affected by the phenol spill are an injury peculiar to the town; none of the other plaintiffs or town residents may properly claim those items of injury as their own.

In addition, the water system which the town constructed is the result of an injury peculiar to the town, to the extent such system was necessary to overcome the damage cause by the phenol spill. The town passed a resolution pursuant to § 60.18(12), Wis. Stats., authorizing the town board to exercise the powers of a village board. One of the powers of a village board under section 61.34(1), Wis. Stats., is "to act for . . . the health, safety, welfare and convenience of the public." The town was faced with a situation where the private wells of its residents were contaminated, leaving them without a safe water source, and it properly acted to protect its residents' health, safety and welfare in procuring the new water system.

I find unpersuasive the defendants' argument that the town is not authorized to recover damages for the cost of the municipal water system because such recovery would be inconsistent with the purpose behind federal grants under the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 et seq. To the extent that the argument is based on the potential double recovery that the town may obtain, the argument is foreclosed by

the collateral source rule. Rixmann v. Summerset Public Schools, 83 Wis.2d 571, 266 N.W.2d 326 (1978). To the extent that the argument rests on the contention that such recovery would violate the Housing and Community Development Act of 1974, I do not believe that the defendants have standing to raise the argument; if the federal government is aggrieved by the town's recovery of these damages, the argument is the government's to make.

Also, I find unconvincing the defendants' suggestion that the town incurred no contractual liability to contractors who built the water system due to the mode of payment through draws against a HUD letter of credit. The town's claim is based on injuries sustained as a result of allegedly tortious conduct by the defendants; the manner by which the town financed the construction of the water system is wholly immaterial to this claim.

The defendants also argue that even if the town may properly prosecute an action for damages on a public nuisance theory, summary judgment dismissing the claim must be granted because the phenol spill did not produce a public nuisance.

The Wisconsin supreme court discussed the theory of public nuisance in State v. Michels Pipeline Construction, Inc., 63 Wis.2d 278, 217 N.W.2d 339, 219 N.W.2d 308 (1974). There the court observed that "Wisconsin cases define public nuisance in terms of the scope of the injury and not in terms of the type of injury." 63 Wis.2d at 286. The Wisconsin court has rejected the notion that the injury must be to an interest common to the general public; instead, the plaintiff must show injury to a sufficiently large sector of the public community. *Id*, at 288. The court also noted that "whether the results of conduct are so common as to amount to a public nuisance is a question of fact for the jury." *Id.*

For these reasons, I disagree with the defendants' position that they are entitled to summary judgment.

The town filed a motion for leave to file a brief in rejoinder in connection with the instant motion. Although

the defendants oppose the town's motion, they availed themselves of the opportunity to respond to the brief in rejoinder. Accordingly, the town's motion for leave to file its brief in rejoinder will be granted.

Therefore, IT IS ORDERED that the plaintiff Town of East Troy's motion for leave to file a brief in rejoinder be and hereby is granted.

IT IS ALSO ORDERED that the motion of the defendant Soo Line Railroad Company for summary judgment dismissing the claim of the plaintiff Town of East Troy, joined in by the defendant Georgia Pacific Corporation, be and hereby is denied.

Dated at Milwaukee, Wisconsin, this 5 day of April, 1979.

/s/ MYRON L. GORDON
U. S. District Judge

District Court's 9/5/79 Decision And Order Denying Soo Line's Post Trial Motions

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TOWN OF EAST TROY,

Plaintiff,

No. 75-C-122 v.

SOO LINE RAILROAD COMPANY,

Defendant.

DECISION and ORDER

This action is before me on the alternative post-trial motions of the defendant Soo Line Railroad for judgment notwithstanding the verdict, for an alteration in the judgment, and for a new trial. All of these motions will be denied.

This action arose out of the derailment of one of the railroad's trains in the town of East Troy in July, 1974. The plaintiffs alleged that the derailment caused carbolic acid manufactured by Georgia Pacific to leak from Soo Line's railway tanker car, resulting in the contamination of the water wells and septic systems of many individuals residing in the Lake Beulah area of the town.

Prior to trial, the individual plaintiffs settled their claims and the defendant Georgia Pacific was dismissed from the suit, leaving the town and the railroad as the only parties at trial. The town's allegations included a claim that the railroad was negligent in several respects. Such negligence allegedly produced a public nuisance in the form of water pollution and spetic system contamination to the prejudice of the "health,

comfort, safety and property of certain of the residents, school children, property owners, taxpayers, tourists and guests of the plaintiff town. . . ." Subsequent to the derailment and consequent contamination, the town undertook the function of furnishing water to residents fo the Lake Beulah area who had previously obtained water from private wells. In this suit the town sought in excess of 1 million dollars in damages for the cost of the new water system and for other miscellaneous expenses it incurred as a result of the acid spill.

Following nine days of trial, the jury found that the railroad was negligent with regard to the operation of the train and the maintenance of the tracks in question and that this negligence was a proximate cause of a public nuisance. The jury also found that $500,000 would reasonably compensate the town for "any damages it reasonably incurred as a result of the derailment and phenol acid spill." Judgment in that amount was entered in favor of the plaintiff on June 14, 1979.

I. Motion For Judgment Notwithstanding The Verdict

The defendant's motion for judgment notwithstanding the verdict is based on two contentions: (1) that any expenses incurred by the plaintiff do not constitute injuries peculiar to the town of East Troy within the meaning of § 823.01, Wis. Stats., and (2) that the entire amount of expenses incurred by the town was covered by a grant made to the town by the United States Department of Housing and Urban Development. In connection with the railroad's pretrial motions, I considered and rejected these arguments in a written decision and order dated April 5, 1979. Since I find no reason to change the conclusion reached in that decision, the railroad's motion for judgment notwithstanding the verdict will be denied.

I note that subsequent to my decision of April 5, 1979, a decision has been rendered which supports my conclusion that the collateral source doctrine applies to funds

given to a plaintiff by a government agency. In Roundhouse v. Owens-Illinois, Inc., ... F.2d ..... (6th Cir., August 16, 1979), the plaintiff fish farmers were forced to destroy sick fish sold to them by the defendant. The court held that compensation received by the plaintiffs' from the state of Michigan did not justify reducing the plaintiffs' recovery from the defendant, since under the collateral source doctrine, money received from an independent source will not diminish recovery from a wrongdoer.

II. Motion To Alter Judgment

The defendant railroad has moved the court to change the answer to question 6 of the special verdict by striking the answer $500,000 and inserting instead an amount not in excess of $125,000. The railroad contends that the plaintiff failed to introduce sufficient evidence to justify greater damages and that as a result, the jury's answer was based on speculation and conjecture. I disagree.

The spilling of a dangerous acid which contaminated the water table in East Troy required that the town take difficult remedial action. In the course of taking such action, the town retained the services of a myriad of professionals: engineers, planners, excavators, chemists, attorneys, geologists, plumbers and hydrogeologists, among others.

With regard to the compensation of these people as well as other expenses incurred by the town, the plaintiff introduced a substantial quantum of evidence at trial. The plaintiff introduced bills, cancelled checks demonstrating the payment of those bills, and itemized statements indicating the type of work done by different people, the amount of the time spent on such work, and the rate of compensation charged for the work. One of the engineers who spent time working for the town testified as to the reasonableness of the fees he charged, which were the highest of any charged by engineers working on the acid spill. Finally, several witnesses testified as to

the remedial steps that were taken by the town. The railroad did not introduce any evidence indicating that the professional fees in this case were unreasonable. In my opinion, this evidence was sufficient to allow the jury to make a rational judgment as to the reasonableness of the expenses incurred by the town. Moreover, I find that the figure of $500,000 arrived at by the jury was adequately supported by the evidence.

The defendants rely on two arguments in challenging the jury's findings as to damages. They briefly argue that at least one of the engineering firms retained by the town made recommendations of action which either were not followed or were ultimately abandoned. On this basis, the defendant suggests that some of the expenses incurred by the plaintiff were "unnecessary." The damage to East Troy's water supply which the jury found resulted from the railroad's negligence required remedial action, the course of which was not clear even to experts. The town was entitled to compensation for expenses incurred as a result of reasonable remedial steps, even if by hind-sight some of those steps may have been missteps. Since the railroad has not demonstrated that any of the approaches taken by the town or its experts were unreasonable, the town is entitled to the compensation it received from the jury.

The railroad also argues that Wisconsin law requires that the reasonableness of the fees charged by professionals retained by the town could not be established except by expert testimony as to that subject. The railroad's position is supported by neither law nor logic. None of the cases relied on by the defendant overturned a jury's finding as to damages which was based on reasonable evidence. In two of the cases, the Wisconsin supreme court overturned jury verdicts in which the jury had apparently ignored the uncontradicted testimony of experts regarding the value of professional services. Estate of Watzek, 211 Wis. 50 (1933); Brust v. First National Bank, 184 Wis. 15 (1924). In the third case, a finding by the trial judge of the value of professional services was overturned by the supreme

court when it found no evidence in the record to support the trial judge's finding. Tullgren v. Karger, 173 Wis. 288 (1921).

None of the foregoing cases requires the conclusion that a jury finding regarding the value of professional services, which is in fact supported by substantial evidence, must be overturned simply because an expert has not testified regarding the reasonableness of the fees charged by each professional. Moreover, the defendant's contention regarding Wisconsin law is refuted by the case of Gerbing v. McDonald, 201 Wis. 214 (1930), in which the court stated:

> "Error is claimed because the court permitted the jury to assess doctor's bills as an element of plaintiff's damages in the absence of evidence of the reasonable value or necessity of the services charged for. The weight of authority seems to be that where the character of the injury and of the treatment and the services of the physician and the amount paid for the service are fully proved, this constitutes evidence from which the jury may allow damages although there is no proof of either necessity or the reasonable value of the services. (Citations omitted). Mere proof of injury and employment of and treatment by a physician entitles the jury to make an award for the service, in the absence of evidence of necessity for or the value of the service. (Citations omitted)." Id. at 218-19.

While the fees in the instant case are significantly higher than those in *Gerbing*, they are substantiated by the record and "do not appear beyond the bounds of reason." Id.

III. Motion For A New Trial

The railroad has moved for a new trial on a number of grounds with which I will deal separately.

A. Damages

The railroad urges that a new trial be granted because the damages found by the jury are allegedly "excessive, unsupported by requisite evidence, and contrary to the weight of the evidence." For the reasons stated above, I find that the jury's finding as to damages was reasonable in light of the evidence, and thus a new trial is not justified on this ground.

B. Jury Instructions

The railroad also claims that its motion for a new trial should be granted because of errors in the jury instructions. The first such instruction dealt with the doctrine of res ipsa loquitur. The railroad, while admitting that the doctrine is generally applicable to derailment cases, maintains that the court erred in giving an instruction based on that doctrine, because there was direct evidence of the railroad's negligence in the record. In Utica Mutual Insurance Co. v. Ripon Cooperative, 50 Wis.2d 431, 439 (1971), the court discussed the factual context in which giving an instruction on res ipsa loquitur is proper:

> "When both parties have rested and the case is ready for the jury, either of two conditions may exist which would render it error to give the *res ipsa loquitur* instruction. The plaintiff may have proved too little or he may have proved too much. For example, if, on the one hand, there has been no evidence which would remove the causation question from the realm of conjecture and place it within the realm of reasonable inferences, then the plaintiff has proved too little, and the doctrine of *res ipsa loquitur* is of no avail, and the case must be dismissed.
>
> "On the other hand, it is possible that the plaintiff's evidence of negligence in a given case has been so substantial that it provides a full and complete explanation of the event, if the jury chooses to accept it. In that case, causation is no longer a

mystery, and the *res ipsa loquitur* instruction would be superfluous and erroneous. *Fehrman v. Smirl*, (1964), 25 Wis.2d 645, 131 N.W.2d 314; *Puls v. St. Vincent Hospital* (1967), 36 Wis.2d 679, 154 N.W.2d 308; and *Knief v. Sargent, supra.*

"There is, of course, a middle ground between these two extremes where the giving of the instruction would be proper. Prosser describes that situation as follows:

'. . . the introduction of some evidence which tends to show specific acts of negligence on the part of the defendant, but which does not purport to furnish a full and complete explanation of the occurrence does not destroy the inferences which are consistent with the evidence, and so does not deprive the plaintiff of the benefit of res ipsa loquitur.' Prosser, *Law of Torts* (Hornbook Series) (3d ed.), ch. 6, p. 236, sec. 40."

In my opinion, the evidence introduced by the plaintiff at trial fell into the "middle ground" discussed above, thereby entitling the town to the res ipsa loquitur instruction. The plaintiff's expert, Paul Jones, testified as to a number of acts done by the railroad which could have been fairly construed by the jury to have been negligent or even wilfull. However, Mr. Jones' testimony neither established which of those acts, if any, actually led to the derailment of the train in question nor precluded the possibility that other acts on the part of the railroad might have caused the derailment. Thus, while I found that the plaintiff had submitted sufficient evidence to remove the question of causal negligence from the "realm of conjecture," since that evidence did not completely explain the reason for the derailment, the instruction on res ipsa loquitur was appropriate. Lee v. Milwaukee Gas Light Co., 20 Wis.2d 333 (1963).

The railroad also challenges instructions given regarding the definition of public nuisance, the police power of a town board, the right of a town to recover damages from nuisance, and the duty of the town to take steps to

obviate injury. I considered these issues both at trial and before trial on the railroad's motion for summary judgment, and I find no reason now to change my conclusion regarding them.

C. Evidentiary Rulings

The railroad argues that various types of evidence were improperly excluded at trial. As to the testimony of experts, my decision and order of March 23, 1979, explains my rationale for barring the testimony of experts whose identities as experts were not revealed until after the discovery deadline had passed. The court's requirement regarding the disclosure of experts was applied to both parties; one of the plaintiff's experts as well as several of the railroad's experts were barred from testifying as a result of the court's order of March 23, 1979. I find no merit in the railroad's other contentions regarding the admissibility of evidence at trial.

D. Sufficiency of the Evidence With Regard to Public Nuisance

The jury was instructed that for a public nuisance to exist a large number of people must be affected. State v. Michels Pipeline Construction Co., 63 Wis.2d 278 (1974). The evidence indicates that hundreds of people were threatened by the spilling of the phenol acid that resulted from the train derailment, and thus the jury's finding of a public nuisance is supported by the evidence.

F. Depositions

The railroad maintains that the plaintiff read portions of certain depositions out of context and thereby prejudicially distorted the testimony contained therein. Since the railroad's attorneys had in each instance the opportunity to read to the jury those portions of the depositions in question which they felt were pertinent, I do not believe that the plaintiff's use of those depositions resulted in any unfairness to the railroad.

IV. Conclusion

Therefore, It Is Ordered that the alternative motions of the Soo Line Railroad Company for judgment notwithstanding the verdict, an order altering the judgment or for a new trial be and hereby are denied.

Dated at Milwaukee, Wisconsin, this 5th day of September, 1979.

/s/ Myron L. Gordon
U.S. District Judge.

Judgment Entered In District Court
On June 14, 1979

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

TOWN OF EAST TROY,

Plaintiff,

No. 75-C-122 v.

SOO LINE RAILROAD COMPANY,

Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Myron L. Gordon, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

That the plaintiff, Town of East Troy, recover $500,000, plus its costs, against the defendant, Soo Line Railroad Company.

Approved MYRON L. GORDON
U.S. District Judge

Dated at Milwaukee, Wisconsin, this 14th day of June, 1979.

RUTH W. LA FAVE
Clerk of Court

Judgment Entered In Court Of Appeals On October 8, 1980

OPINION BY DISTRICT JUDGE EAST

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 8, 1980.

Before

HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. WILLIAM G. EAST, District Judge*

TOWN OF EAST TROY,
a municipal corporation, et al.,

Plaintiffs-Appellees,

No. 79-2120 v.

SOO LINE RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 75-C-122—**Myron L. Gordon**, *Judge.*

This cause came before the Court for decision on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, is sitting by designation.

Court Of Appeals' 12/3/80 Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 3, 1980.

Before

HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. WILLIAM G. EAST, Senior District Judge*

TOWN OF EAST TROY, et al.,

Plaintiffs-Appellees,

No. 79-2120 v.

SOO LINE RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 75-C-122—**Myron L. Gordon**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant Soo Line Railroad Company, a vote of the active members of the Court was requested, and a majority** of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William G. East, Senior District Judge of the District of Oregon, is sitting by designation.

** Judge Cudahy disqualified himself from participation in voting on the petition for rehearing and Judges Pell, Bauer and Wood voted to grant the petition for rehearing *en banc*.

Court Of Appeals' 12/23/80 Order Correcting Order Denying Rehearing

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 23, 1980.

Before

HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. WILLIAM G. EAST, Senior District Judge*

TOWN OF EAST TROY, et al.,

Plaintiffs-Appellees,

No. 79-2120 v.

SOO LINE RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 75-C-122—**Myron L. Gordon**, *Judge.*

ORDER

The Court's December 3 order denying the petition for rehearing in this case should be amended to read as follows:

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled

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* The Honorable William G. East, Senior District Judge of the District of Oregon, is sitting by designation.

cause by defendant-appellant Soo Line Railroad Company, a vote of the active members of the Court was requested, and a majority* of the active members of the Court have voted to deny a rehearing *en banc*. A majority of the judges on the original panel has voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Judge Cudahy disqualified himself from participation in voting on the petition for rehearing, and Judges Pell, Bauer and Wood voted to grant the petition for rehearing *en banc*.

HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

(Relevant Sections)

PUBLIC LAW 93-383; 88 STAT. 633

[S. 3066]

An Act to establish a program of community development block grants, to amend and extend laws relating to housing and urban development, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That:

This Act may be cited as the "Housing and Community Development Act of 1974".

TITLE I—COMMUNITY DEVELOPMENT

FINDINGS AND PURPOSE

Sec. 101. (a) The Congress finds and declares that the Nation's cities, towns, and smaller urban communities face critical social, economic, and environmental problems arising in significant measure from—

(1) the growth of population in metropolitan and other urban areas, and the concentration of persons of lower income in central cities; and

(2) inadequate public and private investment and reinvestment in housing and other physical facilities, and related public and social services, resulting in the growth and persistence of urban slums and blight and the marked deterioration of the quality of the urban environment.

(b) The Congress further finds and declares that the future welfare of the Nation and the well-being of its citizens depend on the establishment and maintenance of viable urban communities as social, economic, and political entities, and require—

(1) systematic and sustained action by Federal, State, and local governments to eliminate blight, to

conserve and renew older urban areas, to improve the living environment of low- and moderate-income families, and to develop new centers of population growth and economic activity;

(2) substantial expansion of and greater continuity in the scope and level of Federal assistance, together with increased private investment in support of community development activities; and

(3) continuing effort at all levels of government to streamline programs and improve the functioning of agencies responsible for planning, implementing, and evaluating community development efforts.

(c) The primary objective of this title is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this title is for the support of community development activities which are directed toward the following specific objectives—

(1) the elimination of slums and blight and the prevention of blighting influences and the deterioration of property and neighborhood and community facilities of importance to the welfare of the community, principally persons of low and moderate income;

(2) the elimination of conditions which are detrimental to health, safety, and public welfare, through code enforcement, demolition, interim rehabilitation assistance, and related activities;

(3) the conservation and expansion of the Nation's housing stock in order to provide a decent home and a suitable living environment for all persons, but principally those of low and moderate income;

(4) the expansion and improvement of the quantity and quality of community services, principally

for persons of low and moderate income, which are essential for sound community development and for the development of viable urban communities;

(5) a more rational utilization of land and other natural resources and the better arrangement of residential, commercial, industrial, recreational, and other needed activity centers;

(6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income; and

(7) the restoration and preservation of properties of special value for historic, architectural, or aesthetic reasons.

It is the intent of Congress that the Federal assistance made available under this title not be utilized to reduce substantially the amount of local financial support for community development activities below the level of such support prior to the availability of such assistance.

(d) It is also the purpose of this title to further the development of a national urban growth policy by consolidating a number of complex and overlapping programs of financial assistance to communities of varying sizes and needs into a consistent system of Federal aid which—

(1) provides assistance on an annual basis, with maximum certainty and minimum delay, upon which communities can rely in their planning;

(2) encourages community development activities which are consistent with comprehensive local and areawide development planning;

(3) furthers achievement of the national housing goal of a decent home and a suitable living environment for every American family; and

(4) fosters the undertaking of housing and community development activities in a coordinated and mutually supportive manner.

DEFINITIONS

Sec. 102. (a) As used in this title—

(1) The term "unit of general local government" means any city, county, town, township, parish, village, or other general purpose political subdivision of a State; Guam, the Virgin Islands, and American Samoa, or a general purpose political subdivision thereof; a combination of such political subdivisions recognized by the Secretary; the District of Columbia; the Trust Territory of the Pacific Islands; and Indian tribes, bands, groups, and nations, including Alaska Indians, Aleuts, and Eskimos, of the United States. Such term also includes a State or a local public body or agency (as defined in section 711 of the Housing and Urban Development Act of 1970), community association, or other entity, which is approved by the Secretary for the purpose of providing public facilities or services to a new community as part of a program meeting the eligibility standards of section 712 of the Housing and Urban Development Act of 1970 or title IV of the Housing and Urban Development Act of 1968.

(2) The term "State" means any State of the United States, or any instrumentality thereof approved by the Governor; and the Commonwealth of Puerto Rico.

(3) The term "metropolitan area" means a standard metropolitan statistical area as established by the Office of Management and Budget.

(4) The term "metropolitan city" means (A) a city within a metropolitan area which is the central city of such area, as defined and used by the Office of Management and Budget, or (B) any other city, within a metropolitan area, which has a population of fifty thousand or more.

(5) The term "city" means (A) any unit of general local government which is classified as a municipality by the United States Bureau of the Census or (B) any other unit of general local government which is a town or township and which, in the determination of the Secretary, (i) possesses powers and performs functions comparable to those associated with municipalities, (ii) is closely settled, and (iii) contains within its boundaries no incorporated places as defined by the United States Bureau of the Census.

(6) The term "urban county" means any county within a metropolitan area which (A) is authorized under State law to undertake essential community development and housing assistance activities in its unincorporated areas, if any, which are not units of general local government, and (B) has a combined population of two hundred thousand or more (excluding the population of metropolitan cities therein) in such unincorporated areas and in its included units of general local government (i) in which it has authority to undertake essential community development and housing assistance activities and which do not elect to have their population excluded or (ii) with which it has entered into cooperation agreements to undertake or to assist in the undertaking of essential community development and housing assistance activities.

(7) The term "population" means total resident population based on data compiled by the United States Bureau of the Census and referable to the same point or period in time.

(8) The term "extent of poverty" means the number of persons whose incomes are below the poverty level. Poverty levels shall be determined by the Secretary pursuant to criteria provided by the Office of Management and Budget, taking into account and making adjustments, if feasible and appropriate and in the sole discretion of the Secretary, for regional or area variations in income and cost of

living, and shall be based on data referable to the same point or period in time.

(9) The term "extent of housing overcrowding" means the number of housing units with 1.01 or more persons per room based on data compiled by the United States Bureau of the Census and referable to the same point or period in time.

(10) The term "Federal grant-in-aid program" means a program of Federal financial assistance other than loans and other than the assistance provided by this title.

(11) The term "program period" means the period beginning January 1, 1975, and ending June 30, 1975, and the period covering each fiscal year thereafter.

(12) The term "Community Development Program" means a program described in section 104(a)(2).

(13) The term "Secretary" means the Secretary of Housing and Urban Development.

(b) Where appropriate, the definitions in subsection (a) shall be based, with respect to any fiscal year, on the most recent data compiled by the United States Bureau of the Census and the latest published reports of the Office of Management and Budget available ninety days prior to the beginning of such fiscal year. The Secretary may by regulation change or otherwise modify the meaning of the terms defined in subsection (a) in order to reflect any technical change or modification thereof made subsequent to such date by the United States Bureau of the Census or the Office of Management and Budget.

(c) One or more public agencies, including existing local public agencies, may be designated by the chief executive officer of a State or a unit of general local government to undertake a Community Development Program in whole or in part.

AUTHORIZATION TO MAKE GRANTS

Sec. 103. (a)(1) The Secretary is authorized to make grants to States and units of general local government to help finance Community Development Programs approved in accordance with the provisions of this title. The Secretary is authorized to incur obligations on behalf of the United States in the form of grant agreements or otherwise in amounts aggregating such sum, not to exceed $8,400,000,000, as may be approved in an appropriation Act. The amount so approved shall become available for obligation on January 1, 1975, and shall remain available until obligated. There are authorized to be appropriated for liquidation of the obligations incurred under this subsection not to exceed $2,500,000,000 prior to the close of the fiscal year 1975, which amount may be increased to not to exceed an aggregate of $5,450,000,000 prior to the close of the fiscal year 1976, and to[87a] not to exceed an aggregate of $8,400,000,000 prior to the close of the fiscal year 1977. Subject to the limitations contained in the preceding sentence, appropriations for—

(A) grants under title VII of the Housing Act of 1961;

(B) grants under sections 702 and 703 of the Housing and Urban Development Act of 1965; and

(C) supplemental grants under title I of the Demonstration Cities and Metropolitan Development Act of 1966,

may be used, to the extent not otherwise obligated prior to January 1, 1975, for the liquidation of contracts entered into pursuant to this section.

* * *

(c) Sums appropriated pursuant to this section shall remain available until expended.

(d) To assure program continuity and orderly planning, the Secretary shall submit to the Congress timely

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87a. So in original. Probably the word "to" should be omitted.

requests for additional authorizations for the fiscal years 1978 through 1980.

APPLICATION AND REVIEW REQUIREMENTS

Sec. 104. (a) No grant may be made pursuant to section 106 unless an application shall have been submitted to the Secretary in which the applicant—

(1) sets forth a summary of a three-year community development plan which identifies community development needs, demonstrates a comprehensive strategy for meeting those needs, and specifies both short- and long-term community development objectives which have been developed in accordance with areawide development planning and national urban growth policies;

(2) formulates a program which (A) includes the activities to be undertaken to meet its community development needs and objectives, together with the estimated costs and general location of such activities, (B) indicates resources other than those provided under this title which are expected to be made available toward meeting its identified needs and objectives, and (C) takes into account appropriate environmental factors;

(3) describes a program designed to—

(A) eliminate or prevent slums, blight, and deterioration where such conditions or needs exist; and

(B) provide improved community facilities and public improvements, including the provisions of supporting health, social, and similar services where necessary and appropriate;

(4) submits a housing assistance plan which—

(A) accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons (including elderly and handicapped

persons, large families, and persons displaced or to be displaced) residing in or expected to reside in the community,

(B) specifies a realistic annual goal for the number of dwelling units or persons to be assisted, including (i) the relative proportion of new, rehabilitated, and existing dwelling units, and (ii) the sizes and types of housing projects and assistance best suited to the needs of lower-income persons in the community, and

(C) indicates the general locations of proposed housing for lower-income persons, with the objective of (i) furthering the revitalization of the community, including the restoration and rehabilitation of stable neighborhoods to the maximum extent possible, (ii) promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons, and (iii) assuring the availability of public facilities and services adequate to serve proposed housing projects;

(5) provides satisfactory assurances that the program will be conducted and administered in conformity with Public Law 88-352 and Public Law 90-284; and

(6) provides satisfactory assurances that, prior to submission of its application, it has (A) provided citizens with adequate information concerning the amount of funds available for proposed community development and housing activities, the range of activities that may be undertaken, and other important program requirements, (B) held public hearings to obtain the views of citizens on community development and housing needs, and (C) provided citizens an adequate opportunity to participate in the development of the application; but no part of this paragraph shall be construed to

restrict the responsibility and authority of the applicant for the development of the application and the execution of its Community Development Program.

(b)(1) Not more than 10 per centum of the estimated costs referred to in subsection (a)(2) which are to be incurred during any contract period may be designated for unspecified local option activities which are eligible for assistance under section 105(a) or for a contingency account for activities designated by the applicant pursuant to subsection (a)(2).

(2) Any grant under this title shall be made only on condition that the applicant certify to the satisfaction of the Secretary that its Community Development Program has been developed so as to give maximum feasible priority to activities which will benefit low- or moderate-income families or aid in the prevention or elimination of slums or blight. The Secretary may also approve an application describing activities which the applicant certifies and the Secretary determines are designed to meet other community development needs having a particular urgency as specifically described in the application.

(3) The Secretary may waive all or part of the requirements contained in paragraphs (1), (2), and (3) of subsection (a) if (A) the application for assistance is in behalf of a locality having a population of less than 25,000 according to the most recent data compiled by the Bureau of the Census which is located either (i) outside a standard metropolitan statistical area, or (ii) inside such an area but outside an "urbanized area" as defined by the Bureau of the Census (or as such definition is modified by the Secretary for purposes of this title), (B) the application relates to the first community development activity to be carried out by such locality with assistance under this title, (C) the assistance requested is for a single development activity under this title of a type eligible for assistance under title VII of the Housing Act of 1961 or title VII of the Housing and Urban Development Act of 1965, and (D) the Secretary deter-

mines that, having regard to the nature of the activity to be carried out, such waiver is not inconsistent with the purposes of this title.

(4) The Secretary may accept a certification from the applicant that it has complied with the requirements of paragraphs (5) and (6) of subsection (a).

(c) The Secretary shall approve an application for an amount which does not exceed the amount determined in accordance with section 106(a) unless—

(1) on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives, the Secretary determines that the applicant's description of such needs and objectives is plainly inconsistent with such facts or data; or

(2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant pursuant to subsection (a); or

(3) the Secretary determines that the application does not comply with the requirements of this title or other applicable law or proposes activities which are ineligible under this title.

* * *

(e) No grant may be made under this title unless the application therefor has been submitted for review and comment to an areawide agency under procedures established by the President pursuant to title II of the Demonstration Cities and Metropolitan Development Act of 1966 and title IV of the Intergovernmental Cooperation Act of 1968.

* * *

COMMUNITY DEVELOPMENT PROGRAM ACTIVITIES ELIGIBLE FOR ASSISTANCE

Sec. 105. (a) A Community Development Program assisted under this title may include only—

(1) the acquisition of real property (including air rights, water rights, and other interests therein) which is (A) blighted, deteriorated, deteriorating, undeveloped, or inappropriately developed from the standpoint of sound community development and growth; (B) appropriate for rehabilitation or conservation activities; (C) appropriate for the preservation or restoration of historic sites, the beautification of urban land, the conservation of open spaces, natural resources, and scenic areas, the provision of recreational opportunities, or the guidance of urban development; (D) to be used for the provision of public works, facilities, and improvements eligible for assistance under this title; or (E) to be used for other public purposes;

(2) the acquisition, construction, reconstruction, or installation of public works, facilities, and site or other improvements—including neighborhood facilities, senior centers, historic properties, utilities, streets, street lights, water and sewer facilities, foundations and platforms for air rights sites, pedestrian malls and walkways, and parks, playgrounds, and recreation facilities, flood and drainage facilities in cases where assistance for such facilities under other Federal laws or programs is determined to be unavailable, and parking facilities, solid waste disposal facilities, and fire protection services and facilities which are located in or which serve designated community development areas;

(3) code enforcement in deteriorated or deteriorating areas in which such enforcement, together with public improvements and services to be provided, may be expected to arrest the decline of the area;

(4) clearance, demolition, removal, and rehabilitation of buildings and improvements (including interim assistance and financing rehabilitation of privately owned properties when incidental to other activities);

(5) special projects directed to the removal of material and architectural barriers which restrict the mobility and accessibility of elderly and handicapped persons;

(6) payments to housing owners for losses of rental income incurred in holding for temporary periods housing units to be utilized for the relocation of individuals and families displaced by program activities under this title;

(7) disposition (through sale, lease, donation, or otherwise) of any real property acquired pursuant to this title or its retention for public purposes;

(8) provision of public services not otherwise available in areas where other activities assisted under this title are being carried out in a concentrated manner, if such services are determined to be necessary or appropriate to support such other activities and if assistance in providing or securing such services under other applicable Federal laws or programs has been applied for and denied or not made available within a reasonable period of time, and if such services are directed toward (A) improving the community's public services and facilities, including those concerned with the employment, economic development, crime prevention, child care, health, drug abuse, education, welfare, or recreation needs of persons residing in such areas, and (B) coordinating public and private development programs;

(9) payment of the non-Federal share required in connection with a Federal grant-in-aid program undertaken as part of the Community Development Program;

(10) payment of the cost of completing a project funded under title I of the Housing Act of 1949;

(11) relocation payments and assistance for individuals, families, businesses, organizations, and farm operations displaced by activities assisted under this title;

(12) activities necessary (A) to develop a comprehensive community development plan, and (B) to develop a policy-planning-management capacity so that the recipient of assistance under this title may more rationally and effectively (i) determine its needs, (ii) set long-term goals and short-term objectives, (iii) devise programs and activities to meet these goals and objectives, (iv) evaluate the progress of such programs in accomplishing these goals and objectives, and (v) carry out management, coordination, and monitoring of activities necessary for effective planning implementation; and

(13) payment of reasonable administrative costs and carrying charges related to the planning and execution of community development and housing activities, including the provision of information and resources to residents of areas in which community development and housing activities are to be concentrated with respect to the planning and execution of such activities.

(b) Upon the request of the recipient of a grant under this title, the Secretary may agree to perform administrative services on a reimbursable basis on behalf of such recipient in connection with loans or grants for the rehabilitation of properties as authorized under subsection (a)(4).

* * *

DISCRETIONARY FUND

Sec. 107. (a) Of the total amount of authority to enter into contracts approved in appropriation Acts under section 103(a)(1) for each of the fiscal years 1975, 1976, and 1977, an amount equal to 2 per centum thereof shall be reserved and set aside in a special discretionary fund for use by the Secretary in making grants (in addition to any other grants which may be made under this title to the same entities or for the same purposes)—

(1) in behalf of new communities assisted under title VII of the Housing and Urban Development Act of 1970 or title IV of the Housing and Urban Development Act of 1968;

(2) to States and units of general local government which join in carrying out housing and community development programs that are areawide in scope;

(3) in Guam, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands;

(4) to States and units of general local government for the purpose of demonstrating innovative community development projects;

(5) to States and units of general local government for the purpose of meeting emergency community development needs caused by federally recognized disasters; and

(6) to States and units of general local government where the Secretary deems it necessary to correct inequities resulting from the allocation provisions of section 106.

(b) Not more than one-fourth of the total amount reserved and set aside in the special discretionary fund under subsection (a) for each year may be used for grants to meet emergency disaster needs under subsection (a)(5).

* * *

No. 80-1174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SOO LINE RAILROAD COMPANY,

Petitioner,

vs.

TOWN OF EAST TROY, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Town of East Troy, respectfully suggests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

This suit involves a claim for damages resulting from groundwater pollution due to leakage from a railway tanker car following a derailment. The action was origi-

nally brought by a number of individuals as well as the Town of East Troy. Damages were claimed to have proximately resulted from specific acts of negligence on the part of the Soo Line Railroad Company (R. 3).

While the individual plaintiffs had all claimed that their private property rights had been interfered with due to, among other things, the contamination of their wells and septic systems, the Town complained that the spill had poisoned the upper (groundwater) aquifer in a large area surrounding the derailment site, and that the carbolic acid would continue to move within the groundwater system for a substantial number of years, thus endangering still more wells and presenting an ongoing threat to the health, comfort, safety and property of the residents, school children, property owners, taxpayers, tourists, and guests of the Town (R. 3).

Petitioner has suggested to the Court that the Town brought this lawsuit for the purpose of recovering the amount of a federal grant used to construct a public water system (Petition at p. 5). Such statement is incorrect in that the Town's ad damnum had nothing do do with the application for or use of federal grant funds.

The damages which the Town demanded totaled approximately $543,000.00, and represented the direct out-of-pocket costs incurred and paid by the Town to abate the public health nuisance created by the spill, of which $125,000.00 constituted the cost of a public water well and distribution system, with the balance of funds expended on engineering fees, water-testing fees, attorneys' fees, monitoring wells, seismic surveys, truck rental, water purchases, and salaries (Pl. Exs. 96, 97, 98, 99A and 99B; Offered at Tr. 664, 664, 675 and 712, 540, 675 and 712, respectively, and Received at Tr. 667, 667, 715, 715 and 715, respectively).

Prior to trial, U.S. District Court Judge Myron L. Gordon determined that the Town's expenses were incurred as the result of a justified attempt to overcome the public nuisance created by the spill, and thus constituted injuries peculiar to the Town for which the instant action could be maintained (Pet. App. 22).

The Soo Line protested that the Town ought not to be allowed to claim as damages, those expenses partially financed by a Block Grant obtained by the Town pursuant to the Housing and Community Development Act of 1974. Judge Gordon denied this contention both prior to trial in an Order Denying Summary Judgment (Pet. App. 23) and subsequent thereto in his Decision and Order Denying Soo Line's Post Trial Motions (Pet. App. 26), in each instance holding that the collateral source rule (providing that a negligent tortfeasor may not take advantage of payments received by an injured party from an independent source) applied to funds given to a plaintiff by a governmental agency.

Following their deliberations after the close of evidence the jury found (R. 129, Tr. 1450-1455):

1. The Soo Line negligent as to track installation and maintenance, as well as to train operation;
2. That such negligence (in both instances) was a proximate cause of the Town's damages;
3. That a public nuisance resulted; and
4. That $500,000.00 would reasonably compensate the Town for its damages.

On appeal, the Seventh Circuit unanimously affirmed (Pet. App. 1).

ARGUMENT

The decision of the Court of Appeals, affirming that of the District Court with respect to both the recovery of necessary and reasonable expenses incurred in the exercise of the Town's lawfully delegated powers, as well as the applicability of the collateral source rule, is correct. There is no conflict or any other basis for further review by this Court.

NONE OF THE ENUMERATED SPECIAL CONSIDERATIONS SET FORTH IN RULE 17 EXIST REQUIRING REVIEW ON CERTIORARI

Petitioner is required pursuant to Rule 21.1(j) of the Rules of the Supreme Court to enumerate the special and important reasons present herein for this Court to exercise its discretion to grant a review on certiorari, referencing those reasons to the standards set forth in Rule 17.1. The latter Rule provides that the character of reasons which will be considered in the grant of a Petition are as follows:

1. Where a Court of Appeals has rendered a decision in conflict with another Court of Appeals on the same matter;
2. Or has decided a federal question in a way in conflict with applicable state law;
3. Or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision;
4. When a state court of last resort has decided a federal question in conflict with the decision of another state court of last resort or of a federal court of appeals; or

5. When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Notwithstanding Rule 21, Petitioner fails to cite concisely or with specificity the reason this Court should grant the Petition, but instead uses the Petition to attack the merits of the lower court decisions.

Their position is that Judge Gordon and the Court of Appeals have misinterpreted the law of the State of Wisconsin as applied to the redress of public nuisances. They continue to assert that the terminology of Wisconsin Statute, Section 823.01 requires a municipality to have incurred damage to publicly-owned real or tangible personal property as a prerequisite to the maintenance of a suit for damages.

This interpretation has been uniformly rejected in the courts below, and will be discussed in brief hereinafter. However, with respect to the grant or denial of the Petition, it should be noted that in any event, certainly there is no federal question involved in this litigation, including the positions taken by Petitioner as described above.

Nor can it be said that the decisions reached herein by the lower courts are in conflict with any decision of another Court of Appeals or of any decision of the United States Supreme Court. No such conflicting decisions have ever been identified by the Petitioner.

Petitioner does not suggest that the trial court or the Court of Appeals have, procedurally, departed from any accepted or usual course of judicial proceedings. Furthermore, the Petitioner has not suggested, and of

course it cannot, that even if the trial court or the Court of Appeals had departed from any accepted and usual course of judicial proceedings, that it was such a departure as to call for the Supreme Court to exercise its supervisory powers over either the trial court or the Court of Appeals.

Under these circumstances, Petitioner is bound to persuade this Court that compelling reasons other than those specifically identified in Rule 17 are presented in this matter which require the attention of this Court.

THE COMMUNITY DEVELOPMENT ACT AND OTHER FEDERAL GRANT PROGRAMS ARE IRRELEVANT TO THE ISSUES ON APPEAL

The Petitioner fails to relate any reason for review other than a general admonition that the decisions of the District Judge and Court of Appeals are "wrong", and unless corrected, will result in attempts to use federal grants as a means of generating "fictitious damage" claims and "windfall recoveries" contrary to public policy.

No appeal has ever been made of the jury's finding that a public nuisance resulted from the spill. The Petitioner *agrees* that the Town was empowered to take action to protect its citizens by constructing a previously non-existent deep water well and distribution system, and *concedes* the applicability of the collateral source rule to the receipt of grant funds (including federal funds) by an injured party.

However, as set forth hereinabove, Petitioner contends that the Town is not an "injured party" and may not maintain this action, since the spill caused no "actual damage" to Town-owned property or facilities.

Under this interpretation, although repeated mention is made in the Petition of federal grants, double recoveries, etc., the point which Petitioner makes is that all the expenses which were incurred by the Town to investigate and clean up the spill, as well as to provide a safe source of potable water supplies to those families whose wells were contaminated, are not recoverable *regardless* of the source of funds (i.e., tax monies, bond proceeds or grant funds).

The key to discussion, then, is whether the Town suffered actual damage or loss, and not the method of financing. The determination of whether damage was or was not suffered is made by applying the substantive law of the State of Wisconsin, a proposition unrelated to federal law and/or the public purposes of various federal grant programs.

The lower courts have considered Petitioner's argument and have rejected same. There can be no prerequisite that a public body must incur damage to publicly-owned real or personal property prior to bringing its action to redress a public nuisance.

Obviously, if some activity fails to constitute a public nuisance, municipal authorities may not bring suit unless they have incurred special damage (i.e., private nuisance). Likewise, a private party may not sue to abate a public nuisance unless he/she has suffered some harm different from that which has been suffered by the public at large.

The rule that bars private parties from suing in public nuisance (without some special damage) cannot be equated to an inability of government to redress public nuisances occurring within their territorial jurisdiction.

A determination that a municipality must incur special injury to its own real or personal property prior to bringing suit to redress a public nuisance (as Petitioner contends) would, in essence, have nullified any distinction between public and private nuisances, and vitiated the ability of the government to act for the protection of life and property of the public at large; and to have entered judgment upon the basis suggested by Petitioner would have left the populace without a remedy in cases where individuals have sustained no injury apart from the rest of the community.

Both the District Judge and the Court of Appeals recognized the fallacy in Petitioner's argument, and ruled that the question of damage turns upon the negligent interference with rights enjoyed by the public at large, including the right to an uncontaminated groundwater supply, and the right to live without a substantial threat to public health. Once these rights were negligently interfered with, the lower courts correctly found that Wisconsin statutory and common law provide for redress by the appropriate municipal authorities (see, e.g., *Boden v. Milwaukee*, 8 Wis.2d 318, 99 N.W.2d 156 (1959) and *Town of Norway v. State Board of Health*, 32 Wis.2d 362, 145 N.W.2d 790 (1966)), and that all necessary and reasonable expenses that are incurred to deal with the situation are recoverable pursuant to the unambiguous terms of Wisconsin Statute, Section 823.01 which provides:

> 823.01 Jurisdiction over nuisances. Any person, county, city, village or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, so far as necessary to protect the complainant's rights and to obtain an injunction to prevent the same.

It is recognized that the considerations set forth in Rule 17 are not exclusive; however, the attempt by Petitioner to bring its Petition on the basis of sensationalistic titles and catch-phrases to suggest that this case involves the viability of federal grant programs is lacking in this instance.

No state or federal agency, nor any division of any state or federal government, nor any department thereof is a party or has been a party to this action, nor are their rights in any way affected by the imposition of ultimate liability on the wrongdoing party for loss which its negligent acts caused.

In fact, the public purposes of the Community Development Act have been well served in this instance in that grant funds were used to partially finance a solution to the disastrous consequences of the spill, to prevent the deterioration of a substantial portion of the Town of East Troy, and to literally save the unincorporated community of Beulah Station from oblivion. This is exactly what the program was created to do.

Petitioner states that the question presented for review herein is whether federal grants may be used to create fictitious tort damages and windfall recoveries. A review of their position, however, is indicative that federal grant funds have nothing to do with the appeal.

Certainly, funds received from any source ought not to be utilized for sham purposes. The question of whether or not an item of damage is allowable or not is, and always has been determined by the fact-finder after considerations regarding whether or not such expense proximately flowed from the negligent act are resolved. Therefore, the "question presented for review" herein will continue to be answered in the negative. Damages

cannot be created, and are determined irrespective of the origin of funds utilized to pay the questioned expense.

THE LOWER COURTS HAVE PROPERLY APPLIED THE COLLATERAL SOURCE RULE TO THE RECEIPT OF GRANT FUNDS

All expenses were incurred by the Town, and paid by the Town.

The Soo Line claims that the Town should not be entitled to what it claims because in effect, it may allow a form of double recovery, using the term "windfall". They are not claiming that HUD has been subrogated to any interest in that any claims for these expenses more properly belong to HUD or the United States government than the Town. They allege no statutory exclusion for such liability nor any statutory right by HUD to be the recipient of such damages as opposed to the Town of East Troy. They simply allege that the Town suffered no actual damage, and that in any event it is against public policy to allow a double recovery. These arguments were twice considered by the trial judge, twice rejected (Pet. App. 19 and 25), and again rejected by the Court of Appeals (Pet. App. 14-15). That the Town incurred damages has been discussed above. In terms of a "windfall recovery", the Wisconsin courts have long held that it is not proper to give a deduction for collateral payments received from sources other than the tortfeasor (see, e.g., *Rixmann v. Somerset Public Schools*, 83 Wis.2d 571, 266 N.W.2d 326 (1978). In fact the two cases cited by Petitioner—*Roundhouse v. Owens-Illinois, Inc.*, 604 F.2d 990 (6th Cir. 1979), and *Eichel v. New York Central R.R.*, 275 U.S. 253 (1963)—both applied the rule to the receipt of federal funds by an injured party.

The method or manner in which the Town sought and obtained financing to partially pay the substantial costs it was incurring to abate the pollution created by the tortious acts of the Petitioner is, as Judge Gordon and the Court of Appeals have rightfully concluded, immaterial. The ultimate responsibility for this contamination has fallen upon the guilty party. To allow the wrongdoers now to escape responsibility for their actions and thereby be the recipient of a windfall would be unconscionable.

CONCLUSION

The ruling by two courts, upon reviewing the record, that the expenses incurred by the Town of East Troy (in cleaning-up the spill of a poisonous substance and constructing a public well to provide a safe source of water for residents whose wells had been contaminated) constituted injuries/damages for which recovery may be had (irrespective of the receipt of federal funds) does not present an important question of federal law unsettled by this Court or one in conflict with another Court of Appeals or a case otherwise calling for the supervision of the Supreme Court of the United States. Rather, the issue is one of an interpretation of the law of the State of

Wisconsin which the lower courts have uniformly construed in the Respondent's favor. The Petition should be denied.

Respectfully submitted,

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REPLY TO RESPONSE IN OPPOSITION

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In The

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October Term, 1980

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO RESPONSE IN OPPOSITION

RESPONDENT'S MISSTATEMENTS SHOULD NOT PRECLUDE THIS COURT'S REVIEW

We will limit our reply to respondent's numerous misstatements of fact and law.

Respondent characterizes the Soo Line as a wrongdoer attempting to "escape responsibility" for its actions. Nothing could be further from the fact (Resp., p. 11).

The Soo Line made substantial settlement payments to each and every one of the Lake Beulah property owners whose wells were in any way contaminated (R. 3). It resisted payment only to the Town, which had no wells, water, or other property affected by the accident and was not supplying water to any resident of Lake Beulah at the time of the occurrence (Tr. 90, 517).

Equally false is respondent's representation that it incurred over $500,000 of "actual damage" that "had nothing to do with the application for or use of federal grant funds" (Resp., pp. 2. 6). In truth, the Town's alleged "loss" consisted of its voluntary application and receipt of the $500,000 HUD grant which it then chose to spend[1] on the formation of a sanitary district, the purchase of land, and the study and construction of its new public well system that was not in existence at the time of the occurrence and was never damaged by the Soo Line. The fact that under these circumstances, the District Court and the Seventh Circuit treated the Town as "an injured party" entitled to "routine" application of the collateral source rule is precisely why this case merits this Court's review.

Respondent's further claim that "the public purposes of the Community Development Act have been well served in this case" (Resp., p. 9) is as preposterous as its claim that the Town's construction of a new well "literally saved the unincorporated community of Beulah Station from oblivion" (Resp., p. 9). In fact, the phenol spill never progressed more than a 1,000 feet from the accident site (Tr. 89, 757, 761, 807) (Def. Ex. 257B)! And, even in that limited area, the contamination was

[1] The grant consisted of a $500,000 letter of credit against which the Town then wrote checks (Def. Ex. 267; Tr. 713-714).

eventually evaporated in a nearby swamp (Tr. 674, 705, 833, 838).

Finally, the Town claims that this case does not fall into any of the nonexclusive categories of cases appropriate for this Court's review under Supreme Court Rule 17 (Resp., pp. 4-5). On the contrary, the unprecedented "make damage" use of the collateral source rule permitted here is an important question calling for the exercise of this Court's supervisory power (Supreme Court Rule 17.3, 17.5) so that similar improper recoveries by public as well as private entities may be prevented. While respondent's Wisconsin Nuisance Law analysis is totally wrong,[2] the instant collateral source rule application is not dependent upon or limited by any state law provision, and unless corrected by this Court, will be precedent for similar misapplications of the rule and the misuses of all types of federal grants in every state.

---

[2] Contrary to respondent's assertions, the "injury peculiar to complainant" requirement in Wisconsin public nuisance actions is expressly made applicable to "counties, cities, villages and *towns*" (emphasis added). Wis. Stat. § 823.01.

CONCLUSION

For these reasons and reasons set forth in the Petition for Certiorari, petitioner Soo Line Railroad Company respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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